Prop. 36 case law as of June 1, 2004[1]

I Prospective vs. retroactive application

Held by the California Supreme Court:

Proposition 36 does not apply to those convicted before the initiative's July 1, 2001, effective date, even if their convictions had not yet become final on appeal as of that date. The prospective application of Prop 36 to only those convicted on or after July 1, 2001, does not violate equal protection of the law. (*People v. Floyd* (2003) 31 Cal.4th 179; see also *In re DeLong* (2001) 93 Cal.App.4th 562 [defendant is "convicted" for Prop 36 purposes at time of sentencing]; *In re Scoggins* (2001) 94 Cal.App.4th 650 [same]; *People v. LeGault* (2002) 95 Cal.App.4th 178, review denied Apr. 10, 2002 [assuming that defendant is convicted when sentenced]; but see *People v. Mendoza* (2003) 106 Cal.App.4th 1030, review denied May 14, 2003 [defendant is "convicted" for Prop 36 purposes at the time of guilt adjudication, not sentencing, so defendant who pled guilty to qualifying drug offense before July 1, 2001, is not entitled to Prop 36 disposition, regardless of when sentencing occurred].)

II Prop 36 only applies to adult offenders convicted of qualifying offenses in adult court

Held by the Court of Appeal:

Prop 36 applies only to eligible adult offenders, or to juveniles convicted in adult courts, who commit qualifying drug possession offenses, and not to juveniles adjudicated for such

[1] **Please be advised:** These case summaries have been compiled for informational purposes only in tracking and explaining the various Prop 36-related issues confronted by the appellate courts. While every effort has been made to describe the case holdings concisely, accurately and in a neutral manner, the summaries do not purport to be definitive, and other readings/interpretations of the summarized cases may be possible. To fully appreciate and understand the import of the decisions listed in this document, readers are encouraged to consult the actual texts of the decisions themselves.

offenses in juvenile court. This differentiation does not violate equal protection of the law. (*In re Jose Z.* (2004) 116 Cal.App.4th 953, petition for review filed Apr. 19, 2004.)

III Questions of eligibility

A. Neither "cultivating marijuana for personal use," nor "maintaining a place" for drug trafficking and use, meet the definition of a Prop-36 qualifying "nonviolent drug possession offense"

Held by the Courts of Appeal:

The offense of cultivating marijuana (Health & Saf. Code, § 11358) does not meet the definition of a Prop 36-qualifying "nonviolent drug possession offense" under Penal Code section 1210(a), which expressly excludes from its terms the production or manufacturing of drugs. This is so even where the person is cultivating, or producing, marijuana for his own use. (*People v. Sharp* (2003) 112 Cal.App.4th 1336.)

The offense of maintaining a place for purpose of unlawfully selling, giving away, or using any controlled substance (Health & Saf. Code, § 11366) also fails to qualify as a "nonviolent drug possession offense" under Penal Code section 1210(a) because it is "more like the commercial offenses expressly excluded from" the provisions of Prop 36. (*People v. Ferrando* (2004) 115 Cal.App.4th 917, review denied Apr. 28, 2004.)

B. Court may require defendant convicted of transportation of drugs to demonstrate that such transportation was "for personal use" in order to qualify for Prop 36

Held by the Court of Appeal:

Defendant convicted of transporting a controlled substance has the burden of demonstrating to the trial court that the transportation was "for personal use" within the meaning of Penal Code section 1210(a), so as to qualify for Prop 36. Further, the principles of *Apprendi v. New Jersey* (2000) 530 U.S. 466, which require certain sentence-enhancement factual allegations to be pled and proven beyond a reasonable doubt if those allegations can raise the maximum penalty for an offense, do not apply to determining a defendant's eligibility for Prop 36. (*People v. Barasa* (2002) 103 Cal.App.4th 287, review denied Jan. 22, 2003; see also *People v. Glasper* (2003) 113 Cal.App.4th 1104, review denied Feb. 18, 2004.)

C. Trial court lacks discretion to strike a prior conviction that makes a defendant ineligible for Prop 36 under Penal Code section 1210.1(b)(1)

Held by the California Supreme Court:

Where an offender is ineligible for Prop 36 under Penal Code section 1210.1(b)(1) for having committed a prior "strike" felony and failing to stay crime-free and out of prison for 5 years, a trial court may ***not*** use its Penal Code section 1385 discretion to strike an action or allegation in furtherance of justice in such a way as to place the ineligible offender into Prop 36. These disqualifying facts are not actions/allegations that are subject to striking under section 1385. (*In re Varnell* (2003) 30 Cal.4th 1132; but see *People v. Orabuena* (2004) 116 Cal.App.4th 84, holding that trial courts ***do*** have section 1385 authority to dismiss an otherwise disqualifying conviction for a "misdemeanor not related to the use of drugs".)

D. Timing of section 1210.1(b)(1)'s 5-year "washout" period

Held by the Courts of Appeal:

Penal Code section 1210.1(b)(1)'s 5-year "washout" period – that is, the 5-year period a defendant convicted of a prior violent or serious felony must remain free of prison custody and committing new crimes in order to be eligible for Prop 36 – refers to the 5 years ***immediately preceding*** the defendant's commission of his or her current drug offense. (*People v. Superior Court (Martinez)* (2002) 104 Cal.App.4th 692; *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78; *People v. Superior Court (Turner)* (2002) 97 Cal.App.4th 1222, review denied Jul. 10, 2002; *People v. Superior Court (Jefferson)* (2002) 97 Cal.App.4th 530.)

Where the drug offender with a prior strike conviction ***was never sent to state prison on the prior strike***, the 5-year washout period begins on the date the defendant committed the prior strike felony, i.e., ***not*** the date of conviction. (*Moore v. Superior Court* (2004) 117 Cal.App.4th 401.)

E. Prior juvenile adjudication does not render adult offender ineligible under section 1210.1(b)(1)

Held by the Court of Appeal:

Because a juvenile adjudication is not a criminal "conviction" for any purpose absent specific statutory language to the contrary, Prop 36's statutory exclusion of certain offenders who have been previously "convicted" of a prior serious or violent felony (Pen. Code, § 1210.1 (b)(1)), does ***not*** apply to those with a prior juvenile adjudication – i.e., rather than an adult conviction – for having committed such an

offense. (*People v. Westbrook* (2002) 100 Cal.App.4th 378.)

F. Misdemeanors not "related to" the use of drugs, which render a defendant ineligible under section 1210.1(b)(2)

Held by the California Supreme Court:

Affirming an earlier decision of the Third District Court of Appeal, the Supreme Court held that driving under the influence of drugs is ***not*** a misdemeanor "related to the use of drugs" within the meaning of Penal Code section 1210(d). This means a defendant convicted of this offense along with an otherwise qualifying drug crime is ***ineligible*** for Prop 36 under the exclusion set forth in Penal Code section 1210.1(b)(2). (*People v. Canty* (May 27, 2004; S109537) ___ Cal.4th ___ [2004 Daily Journal D.A.R. 6302, 2004 WL 1171199][2]; accord, *People v. Goldberg* (2003)

[2] Before granting review in *Canty*, the Supreme Court had granted review in another, similar case involving a misdemeanor theft where the item stolen was a prescription drug for the defendant's own immediate personal use. The Third District Court of Appeal had held that this offense constituted a misdemeanor "related to the use of drugs" within the meaning of Penal Code section 1210(d), which therefore did not render the defendant ineligible for Prop 36 under

105 Cal.App.4th 1202.)

Penal Code section 1210.1(b)(2). (See *People v. Garcia*, review granted Aug. 28, 2002, formerly published at 99 Cal.App.4th 38.) However, because defendant Garcia died while his case was on review, all proceedings relating to this case were ordered permanently abated. The Court of Appeal's original decision remains superseded by the Supreme Court's grant of review. (See Cal. Rules of Court, rule 976(d).)

Pending its decision in *Canty*, the Supreme Court had also granted review and held disposition in a number of other cases in which the appellate courts reached the same or similar conclusion as the Third District did in *Canty*. (*People v. Garcia*, review granted Feb. 11, 2003, formerly published at 103 Cal.App.4th 1228 [driving under the influence of drugs]; *Trumble v. Superior Court*, review granted Jan. 29, 2003, formerly published at 103 Cal.App.4th 1011 [same]; *People v. Walters*, review granted Jan. 22, 2003, formerly published at 103 Cal.App.4th 936 [same]; *People v. Cantu*, review granted Jan. 14, 2004, formerly published at 112 Cal.App.4th 729 [driving under the influence of *alcohol*]; *People v. Ayele*, review granted Jan. 15, 2003, formerly published at 102 Cal.App.4th 1276 [resistance of a police officer said to have been motivated by the use of drugs]; see also *People v. Campbell*, review granted May 21, 2003, formerly published at 106 Cal.App.4th 808 [driving under the influence of drugs is a misdemeanor not related to the use of drugs under sections 1210(d)/1210.1(b)(2), and a non-drug-related violation of probation within the meaning of section 1210.1(e)(2)].) In the near future, the Supreme Court will issue orders regarding the appropriate disposition of these cases.

Held by the Court of Appeal:

In a decision that predated *Canty* by a few months, and which acknowledged that the definition of a Prop 36-disqualifying "misdemeanor not related to the use of drugs" would be addressed by *Canty*, the Sixth District Court of Appeal held that the misdemeanor offense of driving on a suspended or revoked license is plainly not related to the use of drugs, and therefore would disqualify the defendant from Prop 36 eligibility. (*People v. Orabuena* (2004) 116 Cal.App.4th 84.)

G. Trial courts have discretion to strike a current conviction that would render the defendant ineligible for Prop 36 under Penal Code section 1210.1(b)(2)

Held by the Court of Appeal:

As mentioned above, in *In re Varnell* (2003) 30 Cal.4th 1132, the California Supreme Court found that trial courts lack Penal Code section 1385 discretion to dismiss a prior conviction that renders a defendant ineligible for Prop 36 under section 1210.1(b)(1) because such disqualifying convictions are merely uncharged sentencing facts, as opposed to a charge or allegation that may be subject to striking. The Sixth District Court of Appeal has now held that a current accompanying conviction for a "misdemeanor not related to the use of drugs" that would disqualify an otherwise eligible drug offender from Prop 36 under section 1210.1(b)(2) is, by definition, a charge that is subject to striking under section 1385. Therefore, the *Varnell* rationale does not apply in this context, and trial courts do have section 1385 authority to strike an otherwise-disqualifying current "misdemeanor not related to the use of drugs." (*People v. Orabuena* (2004) 116 Cal.App.4th 84.)

H. Refusing drug treatment, which renders a defendant ineligible for Prop 36 under section 1210.1(b)(4), may be implied by conduct

Held by the Court of Appeal:

Drug offender who never reports to drug treatment program has, in effect, "refused" drug treatment as a condition of probation within the meaning of section 1210.1(b)(4) and therefore rendered himself ineligible for a disposition of drug treatment and probation under Prop 36. (*People v. Johnson* (2003) 114 Cal.App.4th 284, review denied Mar. 17, 2004; *People v. Guzman* (2003) 109 Cal.App.4th 341.)

I. For provisions of Prop 36 to apply, the underlying crime resulting in probation grant must be a "nonviolent drug possession offense"

Held by the Courts of Appeal:

A person on probation for felony vandalism is not entitled to have his drug-related probation violations governed by Prop 36's three-tiered scheme for handling such violations (see Pen. Code, § 1210.1(e)(3)). Vandalism is not a qualifying "nonviolent drug possession offense" within the meaning of Penal Code section 1210(a), and Prop 36 does ***not*** apply to a probationer unless probation was granted for a qualifying offense. (*People v. Esparza* (2003) 107 Cal.App.4th 691, review denied June 25, 2003; see also *People v. Goldberg* (2003) 105 Cal.App.4th 1202 [defendant's underlying crimes included such non-covered offenses as driving under the influence].)

Issue to be resolved by the California Supreme Court:

The Sixth District Court of Appeal held that not granting Prop 36 protections to those on probation for most other non-drug crimes violates equal protection of the law since "similarly situated" parolees would be covered by the Prop 36 protections for parolees. But the Court of Appeal opinion has been superseded, and may no longer be cited, now that the California Supreme Court has decided to review the case on the merits. (*People v. Guzman*, review granted Nov. 12, 2003, formerly published at 111 Cal.App.4th 57.) The Supreme Court's opinion will probably not come out until some time in late 2004 or 2005.

J. Being in custody, or getting deported, makes a person unavailable for drug treatment under Prop 36

Held by the Courts of Appeal:

Penal Code section 1210(b) states that drug treatment under Prop 36 does ***not*** include drug treatment programs offered in a prison or jail facility. So, someone who is incarcerated is unavailable for drug treatment within the meaning of Prop 36. (*People v. Esparza* (2003) 107 Cal.App.4th 691, review denied June 25, 2003; *People v. Wandick* (2004) 115 Cal.App.4th 131.)

Where an illegal alien is deported for a drug possession conviction, the trial court may properly deny probation under Prop 36. Once the offender is deported to a foreign jurisdiction, the "premises, requirements, and objectives" of Prop 36 can no longer be satisfied. (*People v. Espinoza* (2003) 107 Cal.App.4th 1069.)

IV Probation under Prop 36

A. Drug-related and non-drug-related violations of probation

Held by the Courts of Appeal:

Penal Code section 1210.1(e)(2) states that a trial court may modify or revoke probation whenever a Prop 36 participant is found to have violated a ***"non-drug-related"*** condition of his or her probation, but Penal Code section 1210.1(e)(3), sets up a progressive 3-tiered violation/revocation scheme to be employed when a Prop 36 participant violates a ***"drug-related"*** condition of probation. Penal Code section 1210.1(f) provides that the "term 'drug-related condition of probation' shall include a probationer's specific drug treatment regimen, employment, vocational training, educational programs, psychological counseling, and family counseling." The appellate courts have addressed some specific probation violations:

Failure to appear in "drug court": The Third District Court of Appeal has held that failing to appear in drug court constitutes a drug-related violation of probation to which subdivision (e)(3)'s 3-tiered scheme would apply. (*People v. Davis* (2003) 104 Cal.App.4th 1443, review denied Apr. 9, 2003.)

Failure to report to probation officer: The First District Court of Appeal observed that, although the probationer in that case was not entitled to Prop 36, a Prop 36 probationer's failure to report to a probation officer would be a non-drug-related violation of probation for Prop 36 purposes. (*People v. Goldberg* (2003) 105 Cal.App.4th 1202.)

The Second District then expressed the somewhat more specific view that a probationer's failure to report to a probation officer would be non-drug-related where the appointment concerns a non-drug-related purpose, such as the probationer's obligation to maintain a residence or employment, complete other types of counseling, or comply with probation generally, but that failing to the violation is drug-related if the missed appointment was for a drug-related purpose such as taking a drug test. (*In re Taylor* (2003) 105 Cal.App.4th 1394 & fn. 7, review denied May 21, 2003.) The Fourth District adopted this view in holding that a failure to report to probation for what the record revealed were non-drug-related reasons was a non-drug-related violation of probation. (*People v. Johnson* (2003) 114 Cal.App.4th 284, review denied Mar. 17, 2004.)

The Third District has held that where a particular violation, such as failing to meet with a probation officer, could be deemed either drug-related or non-drug-related, the prosecution has the burden of demonstrating the non-drug-related nature of the violation where it is seeking to have probation revoked on that basis. (*People v. Atwood* (2003) 110 Cal.App.4th 805.)

Finally, the Third District held that a probationer's failure to comply with the condition that he report to probation by mail once per month is a general, non-drug-

related violation of probation. No further hearing on the matter was necessary (as it was in *Atwood*, *supra*) because the failure to report by mail was not a violation that could have been deemed either drug-related or non-drug-related. Rather, the failure to report by mail had to be non-drug-related because it "could not have involved a drug test nor was there anything else about reporting by mail that was peculiar to [the probationer's] drug problems or drug treatment." (*People v. Dixon* (2003) 113 Cal.App.4th 146.)

Driving under the influence: On May 21, 2003, the California Supreme Court granted review in *People v. Campbell*, formerly published at 106 Cal.App.4th 808. In *Campbell*, the Sixth District Court of Appeal had held that driving under the influence of drugs is a misdemeanor not related to the use of drugs under sections 1210(d)/1210.1(b)(2), pertaining to Prop 36 eligibility in the first instance, *and a non-drug-related violation of probation* within the meaning of section 1210.1(e)(2). Disposition in *Campbell* is deferred pending the Supreme Court's decision in the *Canty* DUI/drugs/Prop 36-eligibility case mentioned above.

Failing to report to mental health "gatekeeper": The Fifth District Court of Appeal held that a probationer's failure to meet with a mental health gatekeeper, who was to have evaluated him for purposes of placing him in an "appropriate treatment program pursuant to the provisions of Proposition 36," was a violation of drug-related condition of probation. (*People v. Dagostino* (2004) 117 CalApp.4th 974 [distinguishing this gatekeeper violation from the more general, non-drug-related conditions of probations at issue in the above-cited *Dixon*, *Goldberg*, and *Johnson* cases].)

B. Trial court discretion to revoke probation under Prop 36

Held by the Court of Appeal:

First drug-related violation of probation: A trial court cannot revoke a person's probation for a first drug-related violation unless the prosecution also shows "by a preponderance of the evidence that the defendant poses a danger to the safety of others" within the meaning of Penal Code sections 1210.1(e)(3)(A) and/or (e)(3)(D). (*In re Taylor* (2003) 105 Cal.App.4th 1394, review denied May 21, 2003; *In re Mehdizadeh* (2003) 105 Cal.App.4th 995, review denied May 21, 2003; *People v. Davis* (2003) 104 Cal.App.4th 1443, review denied Apr. 9, 2003; see also *People v. Murillo* (2002) 102 Cal.App.4th 1414, review denied Jan. 15, 2003.)

Second drug-related violation of probation: A trial court cannot revoke a person's probation for a second drug-related violation unless the prosecution also shows "by a preponderance of the evidence that the defendant poses a danger to the safety of others or is unamenable to treatment" within the meaning of Penal Code sections 1210.1(e)(3)(B) and/or (e)(3)(E). (*People v. Dagostino* (2004) 117 CalApp.4th 974.)

Counting drug-related violations of probation: Under Penal Code section 1210.1(e)(3)(F), a person on probation under the provisions of Prop 36 who is found to have committed three drug-related violations of that probation is no longer eligible for Prop 36, even if one or more of the violations occurred before Prop 36's July 1, 2001, effective date. (*People v. Williams* (2003) 106 Cal.App.4th 694, review denied May 14, 2003.)

Effect of violating non-drug-related condition of probation: When a Prop 36 probationer violates a non-drug-related condition of probation, he "loses the 'grace' granted to probationers otherwise subject to the provisions of Prop[] 36" and therefore "stands in the same shoes as any other probationer and he is subject to whatever sentencing statutes bear on his sentencing." So, where a Prop 36 probationer with three prior felony convictions violates a non-drug-related condition of probation, the trial court properly applied the presumption against probation set forth in Penal Code section 1203(e)(4) for those with two or more prior felonies. (*People v. Dixon* (2003) 113 Cal.App.4th 146.)

C. Trial court discretion to remand into custody pending a formal probation revocation hearing

Held by the Court of Appeal:

If a probationer under Prop 36 is alleged to have committed a first drug-related violation of his probation – meaning that revocation will not be allowed unless the prosecution demonstrates that he poses a danger to the safety of others under Penal Code section 1210.1(e)(3)(A) – then a trial court may not summarily revoke probation and remand the violator into custody pending the formal violation hearing unless there is evidence that the violator is a danger to the safety of others and/or a flight risk. (*In re Mehdizadeh* (2003) 105 Cal.App.4th 995, review denied May 21, 2003.)

V ***Appeal not rendered moot by dismissal of underlying conviction under the terms of Prop 36***

Held by the Court of Appeal:

The fact that a Prop 36 defendant/participant successfully completes her probation and has her underlying drug possession conviction dismissed under the terms of Prop 36 (see Pen. Code, § 1210.1(d)(1)) does not moot her appeal from the underlying conviction. (*People v. DeLong* (2002) 101 Cal.App.4th 482.)

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